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In the Supreme Court of the United States

OCTOBER TERM, 1969

SEARS, ROEBUCK AND CO., PETITIONER

v.

CARPET LAYERS, ETC., LOCAL UNION NO. 419, AND FRANCIS SPERANDEO, REGIONAL DIRECTOR OF THE TWENTY-SEVENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE REGIONAL DIRECTOR

ERWIN N. GRISWOLD,
Solicitor General,

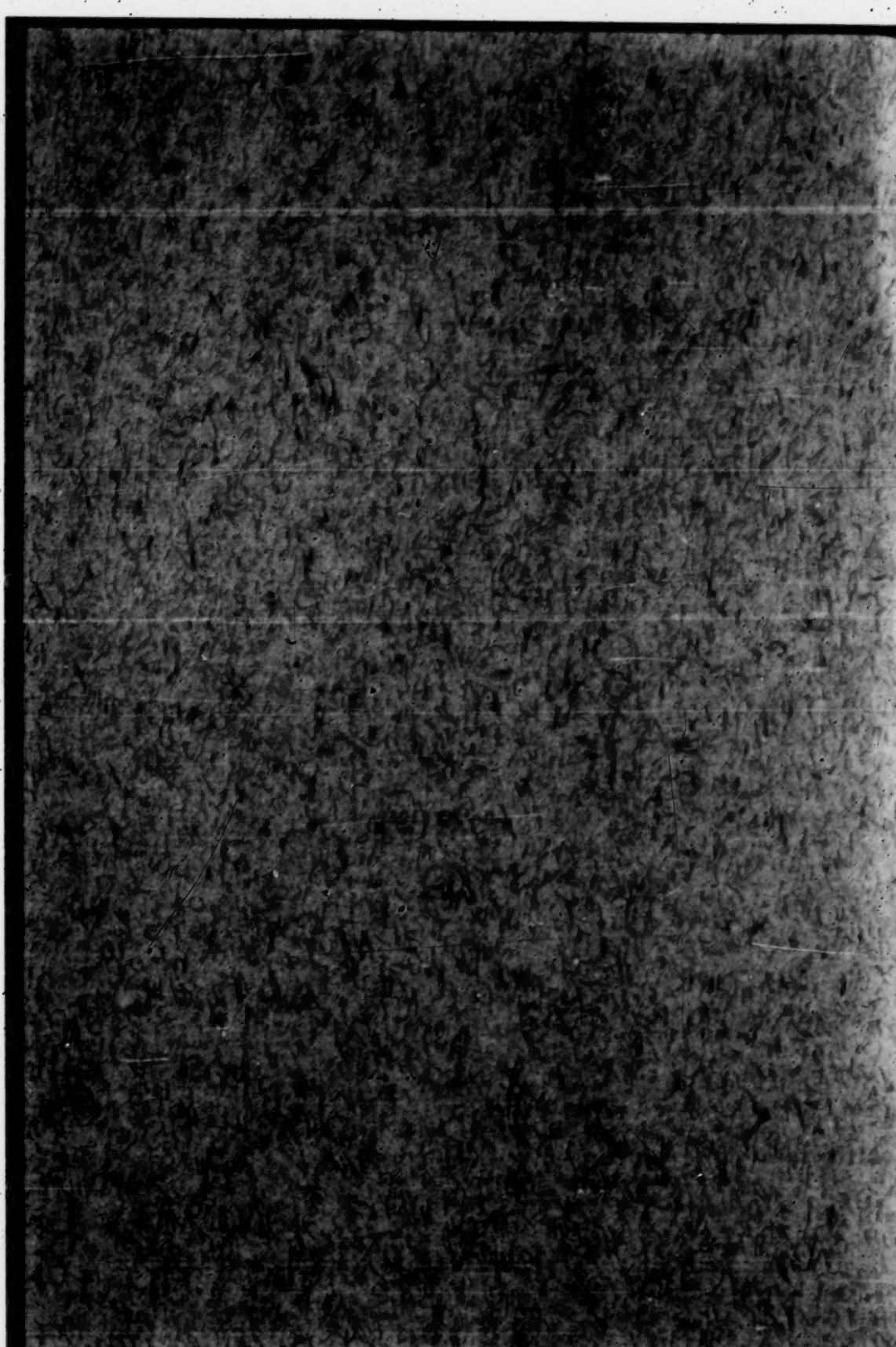
JOSEPH J. [illegible],
Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. [illegible]

[illegible],
General Counsel,

[illegible],
Associate General Counsel,

[illegible],
Attorney,

National Labor Relations Board,
Washington, D.C. [illegible]



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OPINIONS BELOW

The opinion of the court of appeals (A. 124–129) is reported at 410 F. 2d 1148. The oral opinion of the district court (A. 22–28) is unreported. The decision and order of the National Labor Relations Board in the underlying unfair labor practice proceeding (A. 130–134, 80–123) are reported at 176 NLRB No. 120.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1969 (A. 124, 129). The petition for a writ

of certiorari was filed on August 15, 1969, and was granted on November 17, 1969 (A. 142). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 33–41.

QUESTIONS PRESENTED

1. Whether, in a proceeding for a temporary injunction brought by the Regional Director of the National Labor Relations Board pursuant to Section 10(l) of the National Labor Relations Act, the party who filed the underlying unfair labor practice charge has standing to appeal the district court's denial of the injunction petition when the Regional Director does not.

2. Whether the issuance of a final Board decision and order in the unfair labor practice proceeding mooted the controversy here, which relates only to temporary relief pending such a final decision and order.

STATEMENT

Petitioner Sears, Roebuck and Company filed a charge with the Regional Director of the National Labor Relations Board alleging that the respondent Union was engaging in a secondary boycott in violation of Section 8(b)(4)(B) of the Act (A. 10–12). Upon investigating the charge and finding reasonable

cause to believe that it was true and that a complaint should issue, the Regional Director, on August 29, 1968, petitioned the United States District Court for the District of Colorado, pursuant to Section 10(l) of the Act, for a temporary injunction pending the final adjudication of the Board with respect to the matter. The petition alleged in substance that there was reasonable cause to believe that the Union was violating Section 8(b)(4)(B), by picketing Sears' premises for the purpose of compelling Sears to cease using the services of Joe and Eddie's Carpet Service, with whom the Union had a primary dispute, to install floor covering sold by Sears (A. 6–7).

Counsel for Sears appeared at the hearing in the district court; he stated that Sears was not seeking "to intervene" but that it was "entitled to be * * * represented by counsel to present any testimony" (A. 13). Counsel was present throughout the hearing, but did not introduce any evidence or examine any witnesses; his actual participation consisted only of informing the court of the availability of a copy of a contract and of a prospective witness for the Board (Tr. 87, 126).[1]

On September 27, 1968, the district court rendered an oral decision, finding that the relationship between Sears and Joe and Eddie's Carpet Service, although

[1] At the close of the hearing, counsel for Sears apparently agreed with the court that, since the interests of Sears and the Regional Director were the same, it would be appropriate to join his brief rather than file a separate one (A. 14). The brief subsequently filed was signed only by counsel for the Regional Director.

not that of employer-employee, was sufficiently close so that Sears could not be considered a neutral in the Union's dispute with Joe and Eddie's. The court concluded that in these circumstances it was improbable that the Board would find that the Union's activity was secondary, and therefore that the Regional Director was not entitled to a temporary injunction. (A. 26–28.) On October 2, 1968, the court entered an order dismissing the Director's injunction petition (A. 28–29).

The Regional Director decided not to appeal the district court's decision.[2] However, Sears, the charging party, sought to do so (A. 30–35). The Regional Director and the Union moved the court below to dismiss the appeal on the ground that Sears lacked standing (A. 36–52). On May 15, 1969, the appeal was dismissed on that ground (A. 124–129). The court of appeals observed that Section 10(l) of the Act was designed to provide temporary relief, pending final adjudication by the Board, only upon the petition of the Regional Director; that it represented an exception to the Norris-LaGuardia Act[3] limitations on the use of injunctions in labor disputes; and that, on its face, it conferred upon the charging party the right only "to appear by counsel and present any relevant testimony." The court concluded that "to read into that restricted right of participation, the right to

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[2] On the same day that the petition for an injunction had been filed, the director had issued a complaint on Sears' charge (A. 15–21), and a hearing before a Trial Examiner of the Board commenced on October 8, 1968 (A. 81).

[3] 29 U.S.C. 101, *et seq.*

initiate appeals, a right traditionally available only to full party litigants, would not only violate every sound principle of statutory construction, but would require a complete disregard for the sensitivity of the labor injunction problem" (A. 127).[1]

Following the decision of the court of appeals, the Board issued its decision and order in the underlying unfair labor practice proceeding, finding that the Union had violated Section 8(b)(4)(B) of the Act (A. 130–134). The Union has filed a petition to review that decision in the Court of Appeals for the District of Columbia Circuit, the Board has filed a cross-petition for enforcement, and Sears has intervened in that proceeding (A. 135–141).

SUMMARY OF ARGUMENT

I

Section 10(l) of the Act is a narrowly drawn exception to the firmly established federal policy against labor injunctions. It authorizes the district courts to issue temporary injunctions, pending final adjudication by the Board, against secondary boycott activity and certain other unfair labor practices. The private party alleging injury from a secondary boycott may not himself bring suit for an injunction. Only the Board's Regional Director may petition for an injunction under Section 10(l), after the private party has lodged unfair labor practice charges with the Board. The statute provides that the Director shall petition for a temporary injunction when he has reasonable

[1] The court below also rejected Sears' alternative position that it be allowed to intervene in order to prosecute the appeal, on the ground that it should not be allowed to obtain indirectly what it could not obtain directly (A. 129).

cause to believe that the charge is true and that an unfair labor practice complaint should be issued. The decision to institute a Board proceeding, however, is within the discretion of the Regional Director and cannot be compelled by the charging party. When the Director does file a petition for an injunction, Section 10(l) affords the charging party only "an opportunity to appear by counsel [in the district court] and present any relevant testimony." The statute makes no provision for appeals by the charging party from the denial of an injunction, nor does it require the Director to take an appeal.

In light of Congress' express intention to vest complete control over Section 10(l) proceedings in the Board's representative, it is reasonable to construe Section 10(l) as authorizing only the Board's representative to take an appeal where the district court has denied his petition for injunctive relief—and denying such authority to the charging party. This conclusion is confirmed by the legislative history of Section 10(l), which shows that Congress deliberately rejected a proposal to give a private party an independent right to obtain injunctive relief against a secondary boycott, because it feared that this would lead to the indiscriminate use of the labor injunction which the Norris-LaGuardia Act was designed to correct. The Regional Director's decision whether to appeal the denial of Section 10(l) injunctive relief by the district court involves a complex of substantive and policy considerations as important as those involved in his initial decision that a Board com-

plaint is warranted, which is the prerequisite to the availability of injunctive relief. In view of Congress' unwillingness to relax the Norris-LaGuardia Act to permit a private party to obtain an injunction in the first instance, it is unlikely that Congress contemplated that the charging party should be permitted to override the Director's judgment with respect to seeking an injunction at the appellate stage.

II

Since Section 10(l) merely authorizes the issuance of an injunction "pending the final adjudication of the Board with respect to [the] matter," the power to issue such injunctive relief expires upon final Board adjudication. Subsequent to the decision of the court of appeals herein, the Board issued its decision in the underlying unfair labor practice proceeding. Therefore, the question which Sears sought to raise on appeal—whether the district court properly denied injunctive relief under Section 10(l)—has become moot. There is no occasion to decide Sears' standing to maintain such an appeal, for any decision in Sears' favor necessarily would result, on remand, in the dismissal of the injunction petition on the ground of mootness.

ARGUMENT

I. THE CHARGING PARTY IN A LABOR BOARD PROCEEDING LACKS STANDING TO APPEAL THE DENIAL OF THE REGIONAL DIRECTOR'S PETITION FOR A TEMPORARY INJUNCTION PURSUANT TO SECTION 10(L) OF THE ACT.

Section 10(l) of the National Labor Relations Act provides that upon the filing of charges alleging an

illegal secondary boycott or violation of certain other sections of the Act,[7] the Board's regional official shall give priority to the investigation of such charges and, "[i]f, after such investigation," he "has reasonable cause to believe such charge is true and that a complaint [initiating proceedings before the Board] should issue, he shall, on behalf of the Board," petition the federal district court "for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter." Section 10(l) further provides that—

> Upon the filing of any such petition, the courts shall cause notice thereof to be served upon any person involved in the charge and such person, *including the charging party*, shall be given an opportunity to appear by counsel and present any relevant testimony. * * * [Emphasis added.]

The precise language chosen by the Congress in establishing this special procedure shows its intention to vest control over the Section 10(l) proceeding in a Board representative and to restrict the charging party to the limited role specified in the statute. The

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[7] Sections 8(b)(4) (A), (B), or (C), Section 8(e), and Section 8(b)(7). Section 10(l) also is applicable to charges involving Section 8(b)(4)(D), prohibiting jurisdictional strikes, in situations where temporary injunctive relief is necessary (compare Section 10(k)).

[8] This function, like the function of filing the complaint that begins the proceedings before the Board, has been delegated to the Regional Director, who, by virtue of Section 3(d) of the Act, exercises it under the supervision of the General Counsel of the Board.

Section 10(l) proceeding is merely ancillary to the unfair labor practice proceeding that has begun before the Board by the issuance of a complaint under Section 10(b) of the Act. The district court's function is not to adjudicate that controversy, but only to determine whether there is reasonable cause to believe that the unfair labor practice charge will be sustained and whether temporary injunctive relief would be just and proper.[1] And it may only grant "injunctive relief pending the final adjudication of the Board with respect to [the unfair labor practice] matter".[2] The legislative history, which we next discuss, confirms that injunctive relief is to be granted only at the instance of the Regional Director.

V. THE LEGISLATIVE HISTORY OF SECTION 10(L) ESTABLISHES THAT CONGRESS INTENDED TO PRECLUDE PRIVATE PARTIES FROM SEEKING AND ENFORCING INJUNCTIVE RELIEF

1. Section 10(l), in substantially its present form—permitting only the Board to seek injunctive relief—was contained in the bill (S. 1126) reported by the

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[1] See, *e.g.*, *Douds* v. *Milk Drivers Union*, 248 F. 2d 534, 537 (C.A. 2); *Schauffler* v. *Local 1291, International Longshoremen's Ass'n*, 292 F. 2d 182, 187–188 (C.A. 3); *Madden* v. *Int'l Organization of Masters, Mates & Pilots*, 259 F. 2d 312, 313–314 (C.A. 7), certiorari denied, 358 U.S. 909.

[2] The findings of a district court in a Section 10(l) proceeding are not binding on the Board in deciding the case on the merits, or on the court of appeals in reviewing that decision. *National Labor Relations Board* v. *Denver Building Council*, 341 U.S. 675, 682. As stated in *McLeod* v. *Local 25, Int'l Bro. of Electrical Workers*, 344 F. 2d 634, 638 (C.A. 2):

> [w]hen relief is sought under Section 10(*l*), the Board, rather than the federal district court, remains the "primary fact finder" and "primary interpreter of the statutory scheme," * * * subject, of course, to judicial review * * * under § 10(e) and § (f).

Senate Labor Committee in 1947, 1 Leg. Hist. of the Labor Management Relations Act 131–132. The Senate report, commenting on Section 10(l) and the companion provision, Section 10(j),[9] stated:

> Time is usually of the essence in these matters, and consequently the relatively slow procedure of Board hearing and order, followed many months later by an enforcing decree of the circuit court of appeals, falls short of achieving the desired objectives—the prompt elimination of the obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining. Hence we have provided that the Board, acting in the *public interest and not in vindication of purely private rights*, may seek injunctive relief in the case of all types of unfair labor practices and that it shall also seek such relief in the case of strikes and boycotts defined as unfair labor practices. [S. Rep. No. 105, 80th Cong., 1st Sess., p. 8; 1 Leg. Hist. 414, emphasis added.]

The report added (S. Rep. at 27; 1 Leg. Hist. 433):

> Experience under the National Labor Relations Act has demonstrated that by reason of lengthy hearings and litigation enforcing its orders, the Board has not been able in some instances to correct unfair labor practices until after substantial injury has been done. Under

[9] Section 10(j) gives the Board discretionary authority to petition the district court for similar temporary injunctive relief in respect to other types of unfair labor practices.

> the present act the Board is empowered to seek interim relief only after it has filed in the appropriate circuit court of appeals its order and the record on which it is based. * * *
>
> In subsections (j) and (l) the Board is given additional authority to seek injunctive relief. * * * Thus the Board need not wait, if the circumstances call for such relief, until it has held a hearing, issued its order, and petitioned for enforcement of its order.

When the bill reached the Senate floor, Senator Ball proposed an amendment which would have given "an injured party * * * suffering from a secondary boycott or jurisdictional strike, * * * the right to go directly into a district court and seek injunctive relief." 93 Cong. Rec. 4835; 2 Leg. Hist. 1350. The proponents of this amendment argued that secondary boycotts are so objectionable that the injured person should have "the right to control its own litigation, to hire its own lawyer, to take such steps as it deems proper, and to go into such court as it deems proper to proceed in"; the injured party "should not have to depend * * * upon the judgment of some bureaucrat in whom is lodged the power to determine whether such a course should be followed." 93 Cong. Rec. 4837, 2 Leg. Hist. 1353. See also 93 Cong. Rec. 4835–4836, 4838; 2 Leg. Hist. 1350–1351, 1355. The opponents contended, on the other hand, that to permit private parties to obtain injunctive relief for alleged unfair labor practices would open the door to the abuses of the labor injunction which led to the enactment of the Norris-LaGuardia Act, 29 U.S.C. 101, *et seq.* See, *e.g.*, 93 Cong.

Rec. 4133, 4839, 4843, 4846; 2 Leg. Hist. 1057, 1356-1357, 1364–1365, 1369.

Senator Taft, finding "that opposition to restoring the injunctive process even in cases of secondary boycotts and jurisdictional strikes seemed to be so strong," proposed that the language of the Senate bill authorizing the Board alone to obtain injunctive relief be retained, and that the private party be given "the right to sue for damages." 93 Cong. Rec. 4843–4844, 2 Leg. Hist. 1365. The Ball amendment was thereafter defeated (93 Cong. Rec. 4847, 2 Leg. Hist. 1370), and Senator Taft introduced his substitute, which he explained as follows (93 Cong. Rec. 4858, 2 Leg. Hist. 1370–1371):

> This is similar to the Ball amendment, dealing with jurisdictional strikes and secondary boycotts. It eliminates the injunctive process, the suspension of the Norris-LaGuardia Act, which I found was creating so much difficulty and opposition to the Ball amendment. It retains simply a right of suit for damages against any labor organization which undertakes a secondary boycott or a jurisdictional strike.

Senator Taft's amendment, the present Section 303 of the Labor Management Relations Act, was adopted. 93 Cong. Rec. 4874, 2 Leg. Hist. 1400. After the Senate provisions had been approved by the House-Senate Conference Committee, Senator Taft stated:

> The conferees rejected the broad prohibition of all kinds of strikes. They rejected the repeal of the Norris-LaGuardia Act. The provisions regarding injunctions are exactly those which

> were in the Senate bill, and were approved by the Senate. The only strikes which are declared to be illegal are secondary boycotts and jurisdictional strikes. In such cases the injunction can be obtained only through the National Labor Relations Board. * * * [93 Cong. Rec. 6445–6446, 2 Leg. Hist. 1544.]

In sum, the relevant legislative history shows that a proposal which would have given a private party the right to obtain injunctive relief against a secondary boycott was rejected because of the fear that this would lead to the indiscriminate use of the labor injunction which the Norris-LaGuardia Act was designed to correct. The Congress determined to make a narrow exception to the Norris-LaGuardia Act only for injunction suits brought by a Board representative,[10] thereby assuring that no injunction would be issued unless a Labor Board official had satisfied himself that there was reasonable cause to believe that the unfair labor practice charge had sufficient merit to warrant a Board proceeding. See *Building and Construction Trades Council* v. *Alpert*, 302 F. 2d 594, 596–599 (C.A. 1). The only remedy allowed a private party, at his own instance, was a suit for damages under Section 303 of the Labor Management Relations Act.

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[10] Section 10(l) of the Act authorizes the district court to grant injunctive relief "notwithstanding any other provision of law." Moreover, Section 10(h) states that the Norris-LaGuardia Act shall not apply "[w]hen granting appropriate temporary relief or a restraining order * * * as provided in this section * * *."

2. In view of the language of Section 10(l) and its legislative history, the courts have held that a private party cannot maintain a suit to enjoin an unfair labor practice and that an injunction action may be instituted only by the Board or its representative pursuant to Section 10(l) (or Section 10(j)) of the Act. *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F. 2d 183 (C.A. 4); *Amalgamated Ass'n of Street and Motor Coach Employees* v. *Dixie Motor Coach Corp.*, 170 F. 2d 902 (C.A. 8). It has further been held that the decision to issue an unfair labor practice complaint, which is prerequisite to the filing of an injunction petition, is within the discretion of the Board's Regional Director, subject to review only by the General Counsel and not in the courts. *Meckins, Inc.* v. *Baird*, 320 F. 2d 445, 449–450 (C.A. 5); see also *McLeod* v. *Local 239, International Bro. of Teamsters*, 330 F. 2d 108, 111–112 (C.A. 2).

Moreover, the right of the charging party to appear by counsel in a Section 10(l) proceeding and to present relevant testimony does not authorize it to press for relief on a theory not advanced by the Regional Director. As the Court of Appeals for the Second Circuit has stated:

> To do otherwise would not only increase the danger of over-involvement on the part of the federal courts but would also ignore the expertise which section 10(*l*) commands us to attribute to the Regional Director. It is his view of the facts and law the district judge is to evaluate in a section 10(*l*) proceeding. * * * [T]he principal role in these proceedings is

> to be played by the Regional Director acting in the public interest, and while the charging party is free to aid him in the course of the litigation, the charging party may not substitute itself as the principal complainant. * * * [*McLeod* v. *Business Machine Mechanics Conference Board*, 300 F. 2d 237, 243 (C.A. 2); footnote omitted.]

And if an injunction is issued, only the Regional Director, and not the charging party, has standing to institute contempt proceedings for violation of the injunction. *Phillips* v. *United Mine Workers, District 19*, 218 F. Supp. 103 (E.D. Tenn.); *Shore* v. *Bldg. Trades Council*, 50 LRRM 2139, 2141 (W.D. Pa.); cf. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261.

B. IN LIGHT OF ITS LEGISLATIVE HISTORY—SHOWING THAT SECTION 10(l) IS A NARROW EXCEPTION TO THE STRONG FEDERAL POLICY AGAINST LABOR INJUNCTIONS—SECTION 10(l) SHOULD NOT BE INTERPRETED TO ALLOW APPEAL BY A PRIVATE PARTY, WHICH CONGRESS DID NOT EXPRESSLY PROVIDE AND WHICH WOULD BE INCONSISTENT WITH THE PROPER EXERCISE OF THE REGIONAL DIRECTOR'S DUTIES

Although Section 10(l) of the Act makes it mandatory for the Regional Director to petition for a temporary injunction upon finding reasonable cause to believe that a secondary boycott charge has merit, Section 10(l) says nothing about the Regional Director's obligation to take an appeal should the district court deny his request for an injunction. The statute's silence indicates that the decision whether to take such an appeal, under the general provisions of 28 U.S.C.

1292 (a)(1), is within the discretion of the Regional Director and we do not understand Sears to contend otherwise. The statute makes no provision for appeal by a charging party; the question presented is whether the charging party nonetheless has standing to appeal on its own where the Regional Director has decided not to seek review of the district court's denial of his petition for an injunction.

Normally only a party to the proceedings in a lower court has standing to appeal its judgment. See *In re Leaf Tobacco Board*, 222 U.S. 578, 581. Since the charging party is neither petitioner nor respondent in a Section 10(1) proceeding in the district court—the statute entitles it only "to appear by counsel and present any relevant testimony"—it is doubtful whether the charging party has the status of a full party in the district court litigation which would entitle it to appeal. More important, however, there are sound policy considerations for concluding that Congress' failure to make any provision for appeal by the charging party should be interpreted as denying to the charging party any standing to take an appeal from the dismissal of a Section 10(1) injunction petition. In view of the substantive and policy questions, relevant to the Board proceeding, which are presented by the district court's denial of an injunction, a holding that the decision whether to appeal rests exclusively with the Regional Director is more in harmony with the Congressional judgment entrusting the injunction proceeding to the initiative and control of the Director than is Sears' position that, once the injunction pro-

ceeding has been instituted, the charging party can pursue that relief for its own benefit, contrary to the independent judgment of the Director.

The Regional Director's decision whether to appeal the denial of a Section 10(l) injunction does not involve only "manpower or budgetary reasons unrelated to the merits of the case" as Sears suggests (Br. 16). The Regional Director's initial decision to seek injunctive relief involves a judgment whether there is reasonable cause to believe that an unfair labor practice has occurred and whether Board proceedings should be instituted. The court, in turn, must be persuaded that there is reason to believe that the unfair labor practice charge will be sustained and that injunctive relief is just and proper in the circumstances. Should the district court decline to issue an injunction, there may be several reasons, in the light of the court's opinion, upon which the Regional Director might properly conclude that it would be inappropriate to continue to press for an injunction by taking an appeal.

Thus, if the case presents a novel or difficult legal question, the Regional Director or the General Counsel may conclude that, in view of the district court's decision in the union's favor, the ultimate resolution of the issue might be prejudiced if it were presented to the court of appeals before the Board had an opportunity in the unfair labor practice proceeding fully to articulate a rationale for a different position. Similarly, should the district court deny injunctive relief on the ground that the facts of the case are

similar to those of another case in which the Board found no unfair labor practice, the Regional Director, while continuing to believe that the cases are distinguishable, may conclude that there is sufficient doubt as to the merits of the unfair labor practice charge to await the views of the Board itself. Both of these problems were present here: The district court declined to issue an injunction because it found that, although there was not an employer-employee relationship between Sears and the carpet service, there were nonetheless sufficient ties between the two to deprive Sears of a neutral status protected by Section 8(b)(4)(B),[11] and because it viewed the facts here as similar to those in another case in which the Board had recently found no unfair labor practice (A. 26-27).

In these, as well as other situations, the Regional Director's decision whether to appeal the district

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[11] The question whether a person who hires an independent contractor is a "neutral" to the contractor's labor dispute for purposes of Section 8(b)(4)(B) has been a vexing one in the administration of the Act. See *Local No. 24, Int'l Bro. of Teamsters* v. *National Labor Relations Board*, 266 F. 2d 675 (C.A.D.C.); *Building Service Employees Union, Local 32-J* v. *National Labor Relations Board*, 313 F. 2d 880 (C.A. D.C.). Moreover, the determination of independent contractor status itself leaves much room for varying judgments. See *National Labor Relations Board* v. *United Insurance Co.*, 390 U.S. 254.

[12] The Regional Director may conclude, for example, that on the facts as found by the district court, there is no longer a legal predicate for an injunction, but nonetheless decide to continue the proceeding before the Board in the expectation of developing a fuller record and thus obtaining more favorable factual findings. Or the Regional Director, in an effort to persuade the Board to change its position, may seek an in-

court's denial of Section 10(l) injunctive relief involves a complex of substantive considerations which are as important as those involved in the initial decision to issue a complaint and seek injunctive relief. It is most consistent with the expressed intention of Congress to conclude that the evaluation of these considerations should be made exclusively by Board officials. To permit the charging party to appeal the denial of injunctive relief where the Regional Director has decided not to do so, would enable a private party to override the Director's judgment that an injunction is no longer appropriate in the circumstances, and to seek an injunction on its own. It is therefore unlikely that Congress, which was unwilling to relax the Norris-LaGuardia Act to permit the charging party to obtain an injunction in the first instance, would have been willing to relax it to permit it to do so at the appellate stage.[12]

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junction in the face of an outstanding Board decision to the contrary; should the district court deny an injunction because of that decision, the Director could appropriately decide not to appeal in the injunction suit and continue the proceeding before the Board. See *McLeod* v. *Business Machine Mechanics Conference Board*, 300 F. 2d 237, 241-242 (C.A. 2). Or the Regional Director may decide not to appeal because the union has ceased its picketing and has given the Director satisfactory assurance that it will not be resumed pending a final decision of the unfair labor practice case by the Board (see n. 18, *infra*).

[12] Thus, in *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, the Court declined to find that Section 301 of the Labor Management Relations Act impliedly authorized an injunction against breach of a no-strike clause in a collective bargaining agreement, on the ground that a clearer manifestation of congressional intent is required to effect any such partially repealing effect upon such a long-standing, carefully thought out

There is only surface appeal in Sears' contention (Br. 31–38) that, once the Regional Director has decided to institute an injunction suit, the Norris-LaGuardia Act no longer constitutes a bar to the charging party's effort to obtain an injunction on appeal, so long as he does not go beyond the Regional Director's theory of the case. This argument rests on the assumption that, since the Regional Director has already developed the record and his legal theory in the district court, there can be no real conflict with the Director's position by permitting the charging party to prosecute an appeal where the Director has declined to do so.

As we have shown, however, the Director's decision against appeal rests upon substantive and policy considerations which relate essentially to the merits of the unfair labor practice charge in light of the hearing in the district court and the court's decision. To permit the charging party to take an appeal and thereby continue to press for an injunction does in fact place the charging party in opposition to the Director's considered judgment that an appeal is not ap-

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and highly significant part of this country's labor legislation as the Norris-LaGuardia Act" (*Id.*, at 203, footnote omitted). (But compare *The Boys Markets, Inc.* v. *Retail Clerk's Union*, No. 768, O.T. 1969, certiorari granted, January 12, 1970.) And, as the Court stated in *Order of Railroad Telegraphers* v. *Chicago & N.W.R. Co.*, 362 U.S. 330, respecting the Norris-LaGuardia Act: "There are few pieces of legislation where the congressional hearings, committee reports, and the language in the legislation, itself more clearly point to the necessity for giving an Act a construction that will protect the congressional policy the Act adopted" (*Id.*, at 335).

propriate in the prosecution of the unfair labor practice complaint."

The possibility of conflict is not remote. In this case, for example, the trial examiner, prior to oral argument on Sears' appeal in the Tenth Circuit, issued his decision finding that the Union had violated Section 8(b)(4)(B). But the favorable decision of the examiner here is entirely irrelevant to Sears' theory of standing to appeal the denial of a Section 10(l) injunction. Even if the examiner had ordered the complaint dismissed, and the General Counsel had determined not to file exceptions with the Board, Sears

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[11] *Retail Clerks Union, Local 137* v. *Food Employers Council*, 351 F. 2d 525 (C.A. 9) (Sears Br. 22, n. 3, 33-35), is distinguishable from the situation here, as the Ninth Circuit itself recognized in *Henderson* v. *Int'l Union of Operating Engineers, Local 701*, 73 LRRM 2111, 2114, n. 2, decided December 11, 1969. See also *Los Angeles Herald Examiner* v. *San Francisco-Oakland Newspaper Guild*, No. 409, O.T. 1968, certiorari denied, 393 U.S. 926. In *Retail Clerks*, the issue was whether the district court had discretion to grant the injunctive relief originally prayed for by the Regional Director, notwithstanding the fact that the Director had meanwhile entered into a settlement agreement with the respondent union which he believed obviated the need for injunctive relief. The court of appeals held that the district court did have that discretion, for it had the ultimate responsibility for determining the appropriateness of injunctive relief and would otherwise be little more than a rubber stamp for the Regional Director. *Id.* at 530-531. The court of appeals emphasized that its holding was concerned only with the respective roles to be played in the Section 10(l) proceeding by the Regional Director and the district court, and that it was not defining "the limits of the scope of participation to be permitted the charging parties." *Id.* at 529, n. 2. Moreover, the appeal in that case was not taken by the charging parties, but by the respondent union; the charging parties were merely permitted to participate in the appeal as *amici curiae*. *Id.* at 528.

would still claim that it had the right to pursue its appeal in the court of appeals and press for an injunction notwithstanding the fact that the Board's counsel had discontinued the prosecution of the unfair labor practice case. Sears' position that the life of a Section 10(l) injunction extends until the end of the appellate process for review of the Board's decision in the unfair labor practice proceeding—a position which Sears has taken to avoid our contention that this case is moot (see pp. 27–30, *infra*)—highlights the necessary implication of Sears' standing contention. Thus, in the foregoing illustration, even after the Board had sustained the examiner's dismissal of the complaint, Sears would claim a right to maintain its appeal seeking an injunction against the Union at least until it exhausted its appellate remedies to set aside the Board's decision. It is clear, of course, that Sears' position in the Section 10(l) appeal would be diametrically opposed to the General Counsel's position in the Section 10(f) appeal.

Section 10(h) of the Act adds nothing to Sears' argument (see Br. 38–39). That section provides that the Norris-LaGuardia Act shall not be applicable—

> When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section * * *.

The subsections of Section 10, however, make plain that injunctive relief can only be obtained by the Board or its representative. Thus Section 10(j) and

(1) permit only the Board or its representative to petition the district court for a temporary injunction, and Section 10(e) authorizes only the Board to petition the court of appeals "for appropriate temporary relief or restraining order." Section 10(f) merely permits a person aggrieved by a Board order to "obtain a review of such order" in the court of appeals; only the Board can seek enforcement of the order (see *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 266), and the reference in Section 10(f) to the court of appeals granting "such temporary relief or restraining order as it deems just and proper" is also limited to relief sought by the Board. As the Court stated in *Bakery Drivers Union* v. *Wagshal*, 333 U.S. 437, 442:

> The short answer to the argument that * * * [Section 10(h)] has removed the limitations of the Norris-LaGuardia Act upon the power to issue injunctions against what are known as secondary boycotts, is that the law has been changed only where an injunction is sought by the National Labor Relations Board, not where proceedings are instituted by a private party.

C. THE POLICIES WHICH JUSTIFY INTERVENTION BY PRIVATE PARTIES ON JUDICIAL REVIEW OF FINAL BOARD DECISIONS ARE NOT APPLICABLE HERE

In *Local 238, United Automobile Workers* v. *Scofield*, 382 U.S. 205, this Court held that, when the Board has entered an order at the culmination of unfair labor practice proceedings under Section 10(c)

of the Act, either the successful charging party (where the Board finds a violation of the Act (*Fafaire*))[1] or the successful charged party (where the Board dismisses the complaint (*Scofield*)) has the right to intervene in proceedings brought in the court of appeals to review the Board's order. The present case involves, however, a different situation, and the considerations which led the Court to permit intervention in those cases are not present.

In the underlying unfair labor practice proceeding under Section 10(c) of the Act, the person filing the charge participates as a full party pursuant to agency regulations. As the Court noted in *Fafaire*, in addition to being able to "call witnesses and cross-examine others, [he] may file exceptions to any order of the trial examiner, and may file a petition for reconsideration [of] a Board order." 382 U.S. at 219. Moreover, if the Board dismisses the complaint, Section 10(f) of the Act permits the charging party, as a "person aggrieved," to seek review of the dismissal order in the court of appeals. In these circumstances, the Court concluded that the charging party's role in the unfair labor practice proceeding entitled him, where he had succeeded before the Board, and the Board's final order was before the court of appeals either on the losing party's petition to review or the Board's petition for enforcement, to become a party in the court of appeals proceeding. The Court emphasized that, since the proceeding was already in the court of

[1] Two cases were covered by the Court's opinion—*Scofield* (involving the successful charged party), and *Fafaire* (involving the successful charging party).

appeals for decision, to permit such intervention could not affect the Board's discretion respecting whether to initiate a court of appeals proceeding.

Section 10(l), on the other hand, merely affords the charging party "an opportunity to appear by counsel and present any relevant testimony," and his participation before the district court is in fact limited. There is no provision comparable to Section 10(f) which would specifically authorize an appeal by the charging party where he is "aggrieved" by the denial of injunctive relief. And the legislative history of Section 10(l) shows that Congress deliberately intended to deny private parties the right to seek injunctive relief against secondary boycotts and other unfair labor practices. In these circumstances, unlike those on judicial review of the Board's decision, to permit the charging party to institute an appeal from the denial of a Section 10(l) injunction where the Regional Director has declined to do so would give the charging party a substantially greater role in the proceeding than he had previously enjoyed and Congress had specifically authorized. Moreover, as we have shown, it would entail a real danger of impairing the control over the proceeding which Congress intended to entrust solely to the Board or its representative.

Finally, *Fafnir* involved a review of final Board orders, entered after full administrative proceedings. If a charging party who prevailed before the Board were denied the right to participate fully at the appellate stage, he might be deprived of the permanent relief which he sought and obtained through the administrative proceedings, without having had an ade-

quate opportunity to present his views. A temporary injunction under Section 10(l), on the other hand, is effective only during the pendency of the administrative proceedings and the injunction proceeding is expressly not a final adjudication of the parties' rights under the Act. To be sure, the charging party has an interest in obtaining temporary injunctive protection against secondary boycott activity (see Sears' Br. 16, 18-19), But Congress, weighing that interest against the danger of misuse of the injunctive power, authorized the granting of injunctive relief in a proceeding instituted and managed by only the Board's representative, and ancillary to the Board proceeding which will be dispositive of the charging party's rights under the Act.

Contrary to Sears' contention (Br. 13-18), to deny the charging party the right to appeal from the district court's denial of an injunction, presents no constitutional question. This Court has made clear that the right to appeal a lower court's ruling is not an essential ingredient of due process of law. *Lee* v. *Pittman*, 243 U.S. 588, 591; *Reetz* v. *Michigan*, 188 U.S. 505, 508. See also, *Ex Parte Abdo*, 247 U.S. 27, 30; there is a broad distinction which exists between the right to be heard in courts of justice on the one hand and the necessity for the grant of authority on the other to review the results of such hearing by proceedings in error or appeal."

Griffin v. *Illinois*, 351 U.S. 12; *Douglas* v. *California*, 372 U.S. 353, 357; and *Lane* v. *Brown*, 372 U.S. 477 (Br. 14), stand only for the proposition that, where a state has a statute providing for an absolute right of appellate review, it may not draw an "unconstitutional line * * * between rich and poor" in contravention of the Fourteenth Amendment. The other cases cited, *Shields* v. *Utah Idaho Central R. Co.*, 305 U.S. 177, and *St. Joseph Stock Yards Co.* v. *U.S.*, 298 U.S. 38, involve judicial review of *administrative* action, as does the Judicial Review Act, 5 U.S.C. 1032 (Br. 20).

Our submission that jurisdiction to issue a Section 10(l) injunction ends when the Board issues its unfair labor practice decision is consistent with the role of Section 10(l) in the statutory scheme. Section 10(l), and its companion Section 10(j), were added to the Act to enable the Board to obtain temporary injunctive relief against unfair labor practices without having to await a final Board decision and order, as it had been required to do under the Wagner Act (*supra*, pp. 10–11). But after the Board has issued a decision and order, there is no longer any need to proceed in the district court for an injunction. If the Union were to continue its picketing after issuance of the Board's decision holding that activity to violate Section 8(b)(4)(B), the Board could petition the court of appeals under Section 10(e) for injunctive relief pending that court's full review of the Board's decision and order.[14] See *McLeod v. Business Machines Mechanics Conference Board*, 300 F. 2d 237, 241 (C.A. 2); cf. *Federal Trade Commission v. Dean Foods Co.*, 384 U.S. 597.

Therefore, the question whether the district court properly denied injunctive relief under Section 10(l)—the question which petitioner sought to raise

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sons noted by Judge Rives in his dissent (*id.* at 871–872). Moreover, it appears to have been undermined by the subsequent decision in *Monjqua*, *supra*.

[14] It has been unnecessary for the Board to seek such relief in this case, because the Union has agreed to discontinue its picketing of Sears until further notice (Sears' Reply to Memorandum in Opposition to Petition for Certiorari, 8A 1). Where injunctive relief is necessary in a case which has been remanded to the Board by the court of appeals, it may be rendered by the court of appeals in the exercise of its jurisdiction under Section 10(e).

in the court of appeals—is now only of academic interest, and any relief which petitioner seeks in this Court would be "wholly ineffectual for want of a subject matter on which it could operate." *Oil Workers Union* v. *Missouri*, 361 U.S. 363, 371, quoting from *Brownlow* v. *Schwartz*, 261 U.S. 216, 217–218. "An affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other. To adjudicate a cause which no longer exists is a proceeding which this Court uniformly has declined to entertain." *Ibid.* Accord: *Hall* v. *Beals*, 396 U.S. 45; *Brockington* v. *Rhodes*, 396 U.S. 41; *Golden* v. *Zwickler*, 394 U.S. 103; *Harris* v. *Battle*, 348 U.S. 803.

Indeed, a situation virtually identical to the instant case was presented in *Los Angeles Building and Construction Trades Council* v. *LeBaron*, 342 U.S. 802. There, the district court issued a Section 10(l) injunction, 84 F. Supp. 629 (S.D. Cal.), and its decision was affirmed by the court of appeals, 185 F. 2d 405 (C.A. 9). After the union petitioned for a writ of certiorari to review that ruling, the Board issued its decision and order on the merits, 94 NLRB 415. This Court thereupon granted the union's petition and remanded the case to the district court with instructions to vacate its decision and dismiss the injunction petition on grounds of mootness.

The fact that the issue which petitioner seeks to raise in this Court—the charging party's standing to appeal in a Section 10(l) proceeding—is a recurrent

such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order of certification of the Board determining the bargaining representative for employees performing such work: *Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or

products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

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SEC. 10 * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: * * * Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * * In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

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(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor

practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence

order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

* * * * * * *

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued

without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further,* That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D).

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